ORIGINAL

Supreme Court, U.S.
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ALEXANDER L. STEVAS
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

NO. 84-723

DAVID A. GRARRAGHTY, Warden, et.al.

Petitioners.

-vs-

LEMUEL HUBERT HINTON.

Respondent.

RESPONDENT'S BRIEF OPPOSING PETITIONERS'

PETITION FOR WRIT OF CERTIORARI TO:

U.S. COURT OF APPEALS-FOURTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

NO. 84-273

DAVID A. GARRAGHTY, Warden, et.al.

Petitioners.

-vs-

LEMUEL HUBERT HINTON.

Respondent.

BRIEF OPPOSING PETITON FOR WRIT OF CERTIORARI TO THE UNTIED STATES COURT OF APPEALS -FOURTH CIRCUIT

RESPONDENT, Lemuel Hubert Hinton, PRO SE, respectfully moves this Court to deny the Petitioner's application for review on an application for Writ of Certiorari to the judgment of the United States Court of Appeals for the Fourth Circuit entered on August 6th. 1984.

Respondent moves this Court to affirm without opinion the decision of the Court of Appeals upon a determination that the said judgment relies upon core aspects of this Court's holdings both as to Due Process of law under Parratt v. Taylor,

451 U.S. 527, 101 S.Ct. 1908 (1981), and the Eighth Amendment under the criteria of Estelle v. Gamble, 429 U.S. 97. 97 S.Ct. 285, 290 (1976).

WHEREFORE, Petitioner's application for certiorari raises issues fully resolved by these holdings and relied upon the Court of Appeals rule in granting judgment in favor of Respondent, and should therefore be denied in summary affirmance of these said holdings.

JURISDICTIONAL STATEMENT

Although juridiction is invoked by Respondent under 28 U.S.C., Section 1254(1); Respondent submits that review on certiorari is further governed by Rule 17, Rules of the Supreme Court of the United States, and that Petitioner's have therefore improvidently relied upon the said Statutory provisions without justifying such reliance by any indication that the Rules of the Court applies to grant such review in this case through any considerations entitled to under the said Rule.

Respondent submits that the statute does not apply where considerations governing review under that statute is absent; therefore, this Court should refuse to determine the merits of the application for certiorari and deny review thereto.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S.C.A. CONST. AMEND. VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

U.S.C.A. CONST. AMEND, XIV:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty,or property,without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

42 U.S.C.A., Section 1983 (in pertinent part):

"Every person who,under color of any statute, ordinance regulation, custom, or usage, of any State or Territory or the District of Columbia, subject or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured

in any action at law, suit in equity, or other proper proceeding for redress."

CODE OF THE COMMONWEATLH OF VIRGINIA: (Pertinent part only):
SECTION 8.01-195.3(6)

Subject to the provisions of this artilce, the Commonwealth shall be liable for claims for money only accruing on or after July 1, 1982, on account of damages to or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any state employee while acting within the scope of his employment under circumstances where the Commonwealth, if a private person, would be liable to the claimant for such damage, loss, injury or death or for punitive damage, nor shall the amount recoverable by any claimant exceed $25,000, or the maximum limits of any liability policy maintained to insure against such negligence or other tort, if such policy is in force at the time of the act or omission complained of, whichever is greater, exclusive of interest and costs. .....

..... (A)ny recovery based on the following claims --

are hereby excluded from the provisions of this article:

(6) Any claim arising out of the institution or prosecution of any judicial or administrative proceedings even without probable cause."
(1983 Cum. Supp. Code of Virginia, at 32-33)

COMMONWEALTH OF VIRGINIA DEPARTMENT OF CORRECTIONS DIVISION OF ADULT SERVICES DIVISIONAL GUIDELINES:

Divisional Guidelines (DGL) 861 (VIII) Procedures:

A. Code of Inmate offenses:

The following series of offenses are listed in order of their seriousness, i.e. Series 100 and 200 offenses are major offenses. Series 300 are minor offenses.

222. Using vulcar or insolent language directed toward employees or in the presence of the public who are not associated with or employed by the Department of Corrections. NOTE: When this charge is written, the reporting officer

should specify the insolent or vulgar language used."

C: Penalties to be Imposed: (revelant portions only)

1. Only one penalty within a penalty range may be imposed for each violation.

Offenses	Penalties
200 - 231	1 - 7.

B: Authorized penalties:

The following are penalties or disciplinary actions which may be imposed for violations of the Code of Inmate offenses (in order of severity):

1. Reprimand, the fact of which may be reduced to and entered in the inmate's record.
2. Loss of the following priveleges for a maximum of up to 30 days: etc.
3. Confiscation of personal radio, television, stereo or tape player.
4. Cell restriction or quarters restriction for a maximum of fifteen (15) days.
5. Loss of bonus for a maximum of 30 calendar days.
6. Isolation from 1-15 claendar days.
7. Loss of good conduct time up to 30 days and/or isolation from 1-15 days.

STATEMENT OF FACTS

Respondent Hinton disputes the characterization of the case merely by quoting the inartfully narrated statement of the original Complaint sd done by the Petitioners in their application for Writ of Certiorari to the Judgement of the United States Court of Appeals for the Fourth Circuit. SEE: Petitioner's Brief at (2).

The revelant facts representing the Respondent's claim as determined by the Court of Appeals are as follows:

April 15, 1983, Respondent visited the Barber Shop of the Brunswick Correctional Center (B.C.C.) an presented and institutional pass to gain admission for a haircut. Officer Ezzel refused to grant him permission to have a hair-cut, and upon disagreement with the refusal to honor the pass, Cpt. Batts was consulted.

Both Cpt. Batts and Respondent Hinton are black males. Respondent Hinton's pass was disapproved by Cpt. Batts, and Hinton was ordered back to his building.

As cavil over this disapproval of the institutional pass and denial of the hair-cut, Respondent was walking away as ordered to his building when he called Cpt. Batts a "white man's nigger."*

*The term is derisvely used against those black males in positions of authority both as officers or inmates assigned to some position who show a martinent disposition in applying rules and regulations which supervisors apply with discretion themselves.

Cpl. Sawyer a white correctional officer having arrived at the scene heard the comment of Respondent Hinton. Respondent had several books in his hand at the time and was wearing rubber shower shoes on his feet. Respondent was grabbed from behind in a strangle-hold as he was walking away making these comments and had walked passed Cpt. Batts with Cpl. Sawyer in front of him at the time. Cpl. Sawyer used his radio as a club on Respondent while Cpt. Batts kept the strangle-hold on Respondent. Cpl. Sawyer is six feet three and weighs in the neighborhood of three hundred pounds; Cpt. Batts is five feet seven and weighs more than Respondent Hinton who is five-feet six and weighs one hundred and fourty pounds.

After the assault by both men, Respondent was placed upon prehearing detention pending charges for what accrued. In addition to institutional charges, Cpl, Sawyer charged Respondent Hinton with a criminal offense of assault; this charge was tried and dismissed by the trial court after Cpl. Sawyer testified and crosss-examined and before Cpt. Batts who was present, was ever called as a witness. The trial Court ruled that it was satisfied that Respondent Hinton had not made any assault upon Cpl. Sawyer; Cpt. Batts never alleged that Hinton assaulted him and only Sawyer made direct allegations of a direct assault, and such charge was dismissed after trial.

DISPOSITIVE ISSUES PRESENTED

(A)

That the judgment of the Court of in King v. BLankenship, 636 F. 2d 70, 72-73 (4th. Cir. 1980), has been sufficiently squared with the Court's holdings in Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908 (1981) and fully relies upon the fundamental aspects of Eighth Amendment criteria under Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 290 (1976), to require no further review on certiorari to reiterate such recently reiterated and basis principles.

Last term this Court rejected the Sixth Amendment claim to counsel by inmates in administrative segregation pending criminal charges in United States v. Gouveia, __ U.S.__, 104 S.Ct. 2292 (1984), and any Fourth Amendment right in the prison environment to bar any degree of institutional searches in Hudson v. Palmer, __ U.S.__, 104 S.Ct. 3194 (1984); these cases adds to the imprimatur of Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908 (1981) licensing both the negligent and deliberate loss of an inmate's personal property by correctional officers.

Lured by this deferential standard of review of challenges to penal regulations and actions by officers in penal institutions, Petitioners now urge this Court to hold that there is no Eighth Amendment right affording such protections as extended by the Court of Appeals for the FOurth Circuit, against unjustified,

wanton, and unnecessary infliction of pain or harm upon any inmate by the Petitioners.

Deference has been granted to penal institutions and their decisions against various forms of constitutional challenges. SEE: Pell v. Procunier, 417 U.S. 817, 8220828, 94 S.Ct. 2800, 2804-2807 (1974); Hudson v. Palmer, supra; United States v. Gouveia , supra; Wolf v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963 (1974).

HOWEVER, Respondent subnits that this Court has properly limite such deference in respect to certain constitutional claims which does not impede legitimate penal policies and public concerns in such institutions and the organization of prison discipline, and properly determined that there is no 'iron curtain between an inmate and the Constitution.' SEE: Wolf v. McDonnell, 418 U.S. at, 554, 94 S.Ct. at 2974 (1974).

Respondent submits that an unprovoked attack by a six feet three, three hundred pounds correctional officer adided by another who had placed a strangle-hold from the back upon a diminutive 5' 6", Respondent Hinton, was sufficiently grave in the wanton, unnecessary and unjustified infliction of pain and harm upon him to invoke Eighth Amendment protections as determined by the Court of Appeals in granting judgment in Respondent's favor and reversing the grant of summary judgment in Petitioner's behalf in the District Court.

It is not denied that Cpt. Batts grabbed Respondent in a strangle-hold from the back and that Cpl. Sawyer was infront the Respondent and administered punishment to carry out the purpose for which he had been grabbed from the back by his superior officer.

That Cpr. Batts placed the strangle-hold upon Respondent is submitted as a clear invitation to Cpl. Sawyer to assist in the assault upon the Respondent and accomplish the intent of his superior officer in joining the assault upon Respondent.

Therefore, the case presents a clear factual context of a superior officer initiating the assault through a hold upon Respondent when his back was turned and the other officer present assisting in the assult by aiding his superior officer accomplish their purpose.

Respondent does not deny that there are conflicts in the holdings of the Cour of Appeals below on this issue. However, Respondent submits that these conflicts are not sufficiently established for the purpose of considerations governing review on certiorari, and that the rule adopted by the Fourth Circuit Court of Appeals and applied in Respondent's favor in the judgment challenged by the Petitoners, tracks the core aspects of FOurth Amendment law, that any such conflicts should be resolved in a case presenting some conflict with constitutional principles established in the holdings of this Court rather than mere conflicts with other circuits when the rule of the FOurth Circuit itself is not shown to be inccnsistent with any holdings of this Court.

At the outset, Respondent respecfully submits, that the unprovoked nature of the assault is established both as a matter of law and fact.

Respondent was never charged with assault on Cpt. Batts, and Cpl. Sawyer, who alone prosecuted Respondent for an alleged assault through criminal complaitn in the state Courts, had such complaint dismissed after trial agianst Respondent by the trial COurt.

Wherefore, Respondent submits that RES JUDICATA and collateral estoppel applies to resolve all factual issues in his favor to establish that Respondent never made any assault upon either Sawyer or Batts to grant these officers any excuse for the assults by both men upon Respondent. SEE: Allen v. McCurry, 449 U.S. 90,104, 101 S.Ct. 411, 419-420 (1980).

Respondent argues that the use of vulgar language as alleged by Cpt. Batts, is not summarily punished by the use of force through an attack upon his person by two officers as a means of initiating prosecution in an administrative proceedings.

In the context of prison discipline, Commonwealth of Virginia Department of Corrections Divisional Guidlines have sufficiently elevated the use of Vulgar language to a major offense to permit the further opprobrium of assault by two correctional officers upon the Respondent. SEE: Appendix "

Phenomenonal perennial development of Eighth Amendment law in other contexts sufficiently guides the Courts below to determine the precise standards for determining Eighth Amendment claims by discerning the core functions of the constitutional proscritptions embodied therein. SEE: Rummell v. Estelle, 445 U.S. 263, 272, 100 S.Ct. 1133, 1138 (1980); Furman v. Georgia, 408 U.S. 238, 273, 92 S.Ct. 2726, 2744 (1972); Robinson v. California, 370 U.S. 660, 666, 82 S.Ct. 1417, 1420 (1962); Trop v. Dulles, 356 U.S. 86, 99, 78 S.Ct. 590, 597 (1958).

Respondent submits that Eighth Amendment petitons dominate the calendar of this Court, and that the Court has granted increasingly summary disposition of these cases upon determination that adequate considerations for review on certiorari are absent in these cases routinely filed thereto.

Wherefore, Respondent submits, that this case presents no new conflict with holdings of this Court and that it too should be summarily denied for insufficient show that considerations for review in this Court under its certioraro jurisdiction has been established by Petitioners.

Respondent submits that the rule of the Fourth Circuit in King v. BLankenship, 636 F. 2d 70, 73 (4th. Cir. 1980), sufficiently

identifies the Eighth Amendment parameters as relying wholly upon the immemorial core proscriptions delineated as follows from the holdings of the said Court:

> "The precise formulation of when the excessive use of force gives rise to a cause of action under Section 1983 is not an easy one, but in Johnson v. GLick, 481 F. 2d at 1083, the factors to be considered were identified as follows:
>
> In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, and the extend of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." SEE: 636 F. 2d at 73.

The factual basis for application of this Eighth Amendment rule is not in issue; however, Respondent submits that the rule in King v. Blankenship, supra, as recited above, recognizes the same principle announced in Estelle v. Gamble, 429 U.S. 97,103 97 S.Ct. 285, 190 (1976).

This Court has announced that that Eighth Amendment rule makes an evolving standard, and even the core principles of the Eighth Amendment proscribes the wanton infliction of pain and harm under Estelle v. Gamble, supra, to place the rule of King, supra, within the basic requirements of Eighth Amendment provisions.

Respondent submits that the standard of King v. BLankenship, supra, presumes several basis aspects of the Eighth Amendment criteria to render such rule irreducible in its requirements that the force be unjustified, that it be wantonly imposed, and that such force additionally be excessive.

WHEREFORE, Respondent submits that the worst scenario of Eighth Amendment proscriptions is encompassed in the rule of King v. Blankenship, supra, and is therefore congruous to the basic principles enunciated in every holding of this Court in other context under the EIghth Amendment standard against the wanton infliction of pain or harm.

Wherefore, Respondent submits, that where every consistent holding of this Court can be relied upon to resolve any conflicts between the Circuits on the said issue, and where the challenged rule itself is not inconsistent with any of these holdings, the considerations for review on certiorari must be relegated to other applications which presents conflcit with the holdings of this Court and not as here, wholly in accordance with basis principles which need not be further reiterated thereto,

II.

The intentional and deliberate unjustified attack by two correctional employees upon a diminutive Respondent Hinton sufficiently asserts an Eighth Amendment claim of the wanton, unjustified and execessive use of force under Estelle v. Gamble, 429 U.S. 97, 103, 97 S.Ct. 285, 190 (1976).

Assault upon Respondent Hinton by a 6 feet three, 300 pounds Cpl. Sawyer, and Cpt. Batts, of the Brunswick Correctional Center in Virginia, while Respondent was pinned from behind in a strangle-hold from behind, was determined by the Fourth Circuit to present

an Eighth Amendment claim. Respondent was further struck while being strangled from behind, by the use of a radio used as a club to beat the Respondent into submission, merely through the alleged use of vulgar language alleged later by Cpt. Batts.

Respondent was found not guilty of any assault on either of these men through criminal trials after the indictment was dismissed after a trial at which the Court found on the basis of Cpl. Sawyer's testimony that the Respondent had not assaulted him.

Petitioners would have this Court revert to the holdings of Screws v. United States, 325 U.S. 91, 108-109 (1945), and disregard the holdings of this Court in Estelle v. Gamble, supra, recognizing that the Eighth Amendmenr criteria as an evolving standard sufficiently enunciated in Estelle v. Gamble, supra.

In respect to the standards of Estelle v. Gamble,supra, the Court made it clear that an Eighth Amendment violation can therefore adequately rely upon the use of excessive or wanton force to inflict pain or harm.

This Court has held in other context under such evolved standards that:

> " The sanction imposed cannot be so totally without penological justification

that it results in the gratuitous infliction of suffering. " SEE: Rhoades v. Chapman, 452 U.S. 337, 346, 101 S.Ct. 2392, 2399 (1981).

The Court further held in another Eighth Amendment context, that:

"It is fundamental that causing harm intentionally must be punished more severelly than causing harm unintentionally." SEE: Enmund v. Florida, __ U.S.__, 102 S.Ct. 3001, 3377 (1982).

Respondent therefore submits that the holdings in King v. BLankenship, supra, recognizes all these aspects, of intentional harm, gratuitous infliction of punishment without penalogical justification, and the inflcition of punishment to encompass every seminal and fundamental aspect of the Eighth Amendment criteria in irreducible formulation of that provision in the prison context.

Respondent further submits that the Fourth Circuit has further additionally distinguished an isolated attack upon an inmate by another inmate from an attack upon an inmate by correctional officers. SEE: Withers v. Levine, 615 F. 2d 158, 161 (4th. Cir. 1980); Woohous Virginia, 487 F. 2d 889 (4th. Cir. 1973).

Respondent therefore submits, that the enumeration of the Petitioners issue on appeal has shunted the standards of attack by inmates upon another to that by guards upon inmates and seek to superimpose one standard upon the other irrespective of these differing situations and considerations which ought to be made for the purpose of the Eighth Amendment criteria.

THE Courts have consistently rejected such attempts in holding otherwise. SEE: Skevofilax v. Quigley, 586 F. Supp. 532, 542-544 (D.C. N.J. 1984) wherein the Court held, INTER ALIA, that:

> "Plaintifffs must show that the injury inflicted rose to the level of a constit-tutional tort, i.e. that it was so egre-gious as to exceed the boundries of wrongful injuries redressable under tort law and deprived the victim of a Fourteenth Amendment liberty interests without due process of law. ... If the assault alleged here so "shock the conscience" that liability is found, the assaults would be, of necessity, be in violation of clearly established lawm and, as a matter of law, the defendants would not be entitiled to qualified immunity.

Morever, if a due process requirement is annexed to the Eighth Amendment protections under Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908 (1981), it is clear that the Petitioners have not established any state remedies sufficiently to require the claim to be determined a state Court forum.

Respondent submits that the 8th. Amendment does have some due process component. SEE: Baker v. McCollom, 443 U,S. 137, 146-147, 99 S.Ct. 2689, 2695-2696 (1979); Estelle v.Gamble, supra, at 106, 97 S.Ct. at 295; Roe v. Wade, 410 U.S. 113, 152-156, 93 S.Ct. 705, 726-728 (19730); Rochin v. California, 342 U.S. 165, 172, 72 S.Ct/ 205, 209 (1952); Perry v. Walker, 586 F. Supp. 1264, 1266-1267 (E.D.. Va. 1984).

The prosecution of Respondent's claim of unwarranted and unjustified and excessive use of force by the Petitioners, cannot be brought in the state court under the tort claims act of the Commonwealth of Virginia. SEE: Code of Virginia (1950) Section 8.01-195.3(6), as amended.

Wherefore, Respondent respectfully submits that the Fourth Circuit properly determined the claim as an Eighth Amendment claim and that analysis of the claim under a due process of law aspect as required under Parratt v. Taylor, supra, does not militate for any further determination than that concluded by

the Court of Appeals in the present case.

Respondent submits that the due process of analysis of Parratt v. Taylor, supra, is akin to abstention, and that the following determinations of this Court in Moore v. Sims, 442 U..S. 415, 425, 99 S.Ct. 2371, 2378 (1979), governs the determination of federal jurisdiction to determine constitutional claims in every context including the Eighth Amendment claim determined by the Fourth Circuit. This Court held, INTER ALIA, that:

> "Abstention is approporiate unless state law clearly bars interposition of constitutional claims."

WHEREFORE, under Parratt v. Taylor, supra, the Respondent submits that the Code of Virginia (1950) Section 8.01-195.3(6), bars the interposition of the claims presented in the state Court, and that the said claims were properly determined in the federal court and granted by the Court of Appeals below.

THEREFORE Respondent moves this Court to affirm the judgment of the Court of Appeals as a proper and fundamental resolution of Eighth Amendment criteria and due process of law.

C O N C L U S I O N

For all of the foregoing reasons, Respondent Hinton prays that this Court will affirm the judgment and determination of the United STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, and deny the Petitioners application for Writ of Certiorari to the said judgment of the Court below.

Respectfully submitted

BY: Lemuel Hubert Hinton

LEMUEL HUBERT HINTON

Respondent-PRO SE.

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing"Respondent's Brief Opposing the Petition for Writ of Certiorari to the Judgment of the UNited States Court of Appeals, for the Fourth Circuit, was mailed to Mr. Guy W. Horsley, Jr., Assistant Attorney General, 101 N. 8th. Street, Supreme Court Building, Richmond. Virginia 23219, on this: 18th day of January 1985.

BY: Lemuel Hubert Hinton

LEMUEL HUBERT HINTON

Respondent (Pro Se.